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IN THE SUPREME COURT OF THE UNITED STATES

No. 618

A. F. REEDER,
Appellant,

VERSUS

W. F. BANKS; ERNEST MORRIS, County Treasurer of Washita County, Oklahoma,
Appellee.

PETITION FOR REHEARING

LOCKWOOD JONES,
ARNOLD T. FLEIG,
W. R. BANKER,
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APRIL, 1948.

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To the Supreme Court of the United States and the Justices Thereof:

Comes now A. F. Reeder, the appellant in the above entitled cause, and presents this, his petition, for a rehearing of the above entitled cause, and, in support thereof, respectfully shows:

PRELIMINARY STATEMENT

Inasmuch as the order of the Court merely states the appeal is dismissed for lack of a substantial federal ques-

tion, the appellant, of course, is unable to ascertain what were the ground or grounds for dismissal. It is, therefore, necessary for us to assume that this Court found the federal question devoid of merit either because (a) the appeal was predicated on false assumptions; or (b) the federal question urged was contrary to the established law; or (c) only a state question was involved.

The grounds enumerated in our petition for rehearing will, therefore, be aimed at each of the three grounds on which this Court may have relied. We are, of course, mindful of the fact that the Court has carefully considered our jurisdictional statement. We are also mindful of the gap between the Supreme Court bench and the Bar as to what statutes will be declared unconstitutional. In this case, however, we respectfully urge that the gap is not so much between the bench and Bar as between the "bench and the bench," as it were. Thus, MR. JUSTICE GIBSON of the Oklahoma Supreme Court, making the same assumptions that we made in presenting our appeal, found the 1939 Act, which we assailed, clearly violative of Article 1, Section 10, of the United States Constitution, and believed the question to be of the gravest importance, justifying an extended and logical dissenting opinion. Further, the United States Circuit Court of Appeals for the Tenth Circuit unanimously held that said act impaired the obligation of contract in violation of Article 1, Section 10, of the United States Constitution. It is apparent from

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the language of the Circuit Court of Appeals that the Act was patently unconstitutional in their judgment.

With this background and with the experience that counsel in this case have had in this highly specialized field for many years, we think it understandable that we would suppose the federal question to be of such substance as to require consideration by this Court. We believe, therefore, that we must have failed to adequately present this matter to this Court, because we are still of the opinion that the 1939 Act (Senate Bill 164, 1939 Session Laws of Oklahoma, Page 156, Sections 242 to 242c, inclusive, Title 11, O. S. A.) is a clear if ingenious and subtle device for breaching a solemn obligation.

We submit the following grounds for our petition:

1. The Court failed to give full consideration to the provisions of statute entering into the contract between the bondholders and the City of New Cordell, for the levy and collection of the special assessments.

2. The Court failed to give full consideration to the fact that the special assessments or special taxes were the sole source of payment of appellant's bonds, and were not an obligation of the city, notwithstanding the fact that the bonds were issued by the city.

3. The Court failed to consider that the term "special assessment lien" is misleading in that the so-called lien only secures the special assessment itself, and is not security for any other or further general obligation; and thus a withdrawal of our lien is a withdrawal of the only right we possessed for the collection of the bonds.

4. The Court failed to consider that the assessment or tax consisted of two inseparable parts: (1) the levy or assessment; and (2) the proceedings for the collection of the assessment by tax sale — so that a withdrawal of the latter amounted automatically to an extinguishment of the former.

5. The Court failed to consider that a statute of limitations may only operate on the remedy incidental to a contract; and the only remedy given to the bondholder for foreclosure of his lien was a judicial proceeding, with which we are not concerned.

6. The Court failed to consider the distinction between the remedy exercisable by a bondholder in a judicial proceeding which he controls, and the duties prescribed by legislation for a governmental official in the conduct of a tax sale.

7. The Court failed to recognize that a tax sale proceeding in Oklahoma is not in any way contractual in nature but is governmental.

8. The Court failed to give consideration to the fundamental injustice of penalizing the bondholder by extinguishing his contractual right by reason of the fault of third parties, to-wit: by reason of the dereliction of the county officials in failing to conduct the tax sales.

9. The Court failed to recognize that the county treasurer had no personal interest in selling property for special assessments and was, in effect, excused from doing so by the 1939 Act, which imposed no penalty on the

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county treasurer for failure to conduct a tax sale, but at the same time, rewarded the property owner with a lien extinguishment.

10. The Court failed to consider that, inasmuch as the collection of special assessments could not be hindered when the contract provides for collection in the same manner as general taxes [*Seibert* v. *Lewis*, 122 U. S. 284, 30 L.ed. 1161], the Legislature could not, therefore, destroy the special assessment lien; a withdrawal of the tax sale proceeding being a withdrawal of the most substantial element of the right itself, and not a change or withdrawal of a remedy.

11. The Court failed to give proper consideration to *Von Hoffman* v. *Quincy*, 4 Wall. 535, 18 L.ed. 403, in which the Court held that the state could not disable itself from executing a power in trust promised under prior legislation.

12. The Court failed to observe that the withdrawal of the right to conduct the tax sale in the 1939 Act was a greater impairment than the cancellation of a portion of the tax in *Von Hoffman* v. *Quincy*.

13. If the Court based its decision on *Wheeler* v. *Jackson*, 137 U.S. 245, then the Court failed to distinguish between a limitation placed upon a right exercisable by an individual and a limitation placed upon a governmental act as in the 1939 Act.

14. The Court failed to consider that the sole source of payment, to-wit: the special assessments, are an invol-

untary tax and a so-called limitation on the tax collecting powers is simply a legislative sanction or consent to a repudiation of these assessments.

15. The Court failed to give consideration to the fact that a so-called limitation on the power of tax sale amounted to a promise to the taxpayer that his property would be absolved of the lien of special assessments without giving to the bondholder any means of gaining fulfilment of his contract.

16. The Court failed to give consideration to the fact that said Act did not serve the public welfare but was simply a means of enabling the state to break the bondholders' contract.

17. If the Court based its dismissal of our appeal upon the ground that the sale is only a remedy, which we deny, then the Court erred in failing to recognize that said so-called remedy was in reality a means of activating or effectuating the special assessment tax, and the withdrawal of said tax sale was in reality simply an extinguishment of the lien *in futuro*.

18. The Court failed to give consideration to the fact that the contract provided for under the Oklahoma laws for the collection of these special assessment bonds was unique in that the special assessment lien was of equal dignity with the *ad valorem* tax lien.

19. The Court failed to give consideration to the fact that the vested right of the state to change remedies and impose statute of limitations was expressly precluded

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by the Legislature with reference to the special assessment liens by the provision of the statute under which these liens were created promising co-equality with *ad valorem* tax.

WHEREFORE, upon the foregoing grounds, it is respectfully urged that this petition for rehearing be granted, and that the order of the Court dismissing appeal be rescinded, and the judgment of the Supreme Court of the State of Oklahoma be, upon further consideration, reversed.

Respectfully submitted,

LOCKWOOD JONES,
ARNOLD T. FLEIG,
W. R. BANKER,
SOLON W. SMITH,
Counsel for Appellant.

APRIL, 1948.

CERTIFICATE OF COUNSEL

We, counsel for the above-named appellant, do hereby certify that the foregoing petition for a rehearing of this cause is presented in good faith and not for delay.

LOCKWOOD JONES,
ARNOLD T. FLEIG,
W. R. BANKER,
SOLON W. SMITH.